84-769

No.

Office - Supreme Court, U.S.
FILED
NOV 9 1984
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ALBERT JOHN FERN, JR. and
ROBERT LEWIS STIRM, PETITIONERS

v.

JOAN TURMAN, JOHN O. MARSH,
SECRETARY OF THE ARMY, LORETTA F.ADAMS
AND VERNE ORR, SECRETARY OF THE AIR FORCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mattaniah Eytan
KAPLAN, RUSSIN, VECCHI,
EYTAN & COLLINS
332 Pine St., 4th Floor
San Francisco, CA 94104
(415) 421-1100

Attorney for Petitioners

104 pp

QUESTIONS PRESENTED

(1) Does a federal district court have discretionary authority to reject jurisdiction in a diversity case on grounds of the marital exception to federal jurisdiction where important issues implicating substantial federal interests are involved and the traditional elements of the marital exception -- alimony, child custody or status of the parties -- are not present?

(2) Must a district court exercise its federal question jurisdiction in a suit by a retired military officer seeking entitlement to retired pay, where the former spouse defends upon res judicata grounds based upon a prior state court judgment which issued without subject matter jurisdiction?

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Albert John Fern Jr. and Robert Lewis Stirm, retired military officers, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 10, 1984, which affirmed an order and judgment of the District Court for the Northern District of California dismissing sua sponte a complaint brought by petitioner Fern against Joan Turman, his former spouse, and against the Secretary of the Army, and affirmed a separate order by the district court in an unrelated case dismissing a complaint brought by petitioner Stirm against Loretta F. Adams, his former spouse, and the Secretary of the Air Force.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PETITION FOR WRIT OF CERTIORARI	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	xiv
JURISDICTION OF THIS COURT TO ENTERTAIN THE PETITION	xiv
FEDERAL JURISDICTION BEFORE THE DISTRICT COURT	xv
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	xv
STATEMENT OF FACTS	1
A. PROCEDURAL HISTORY	1
B. ARGUMENTS PRESENTED TO THE LOWER COURT ON THE MERITS OF THE SUBSTANTIVE DISPUTE	13
ARGUMENT	26
I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS AS TO THE SCOPE TO BE GIVEN TO THE MARITAL EXCEPTION TO THE EXERCISE OF FEDERAL JURISDICTION	26

Page

II. THE ISSUES ARE IMPORTANT 34

III. THE DECISION BELOW IS ERRONEOUS 40

CONCLUSION 54

APPENDIX

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Albanese v. Richter, 161 F.2d 688 (3d Cir. 1947) cert den 332 U.S. 782 (1947)	27
Allen v. Allen, 518 F.Supp. 1234 (E.D. Pa. 1981)	27
Armstrong v. Armstrong, 696 F.2d 1237 (9th Cir. 1983)	26
Armstrong v. Armstrong 508 F.2d 348 (1st Cir. 1974)	29
Bacon v. Bacon, 365 F.Supp. 1019 (D. Or. 1973)	27
Barber v. Barber, 62 U.S. (21 How.) 582, 16 L.Ed. 226	35, 36, 38
Bennett v. Bennett, 682 F.2d 1039 (D.C. Cir. 1982)	30
Bradley v. School Board, 416 U.S. 694, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974)	18
Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968)	27
Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943)	46

Page

Canton v. Spokane School Dist. No. 81, 498 F.2d 840 (9th Cir. 1974) 45

Carpenter's Pension Trust, etc. v. Kronschnabel, 460 F.Supp. 978 (C.D. Cal. 1978) aff'd 632 F.2d 745 (9th Cir. 1980) cert den 453 U.S. 922 (1981) 14, 15

Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) 22

Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980) 30, 40

Costello v. United States, 587 F.2d 424, (9th Cir. 1978), cert. den. 442 U.S. 929 (1979) 18, 19

Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978) 29

Csibi v. Fustos, 670 F.2d 134 (9th Cir. 1982) 27

Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963) 16

Erspan v. Badgett, 647 F.2d 550 (5th Cir. 1981) cert den 455 U.S. 945 (1982) 32, 33

Ex parte Burrus, 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890) 9, 35

	Page
Firestone v. Cleveland Trust, 654 F.2d 1212 (6th Cir. 1981)	29, 32
Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981)	17, 21
Franks v. Smith, 717 F.2d 183 (5th Cir. 1983)	31, 36, 40, 42
Fusorro v. Fusorro, 550 F.Supp. 1260 (E.D. Pa. 1982)	27
Gargallo v. Gargallo, 487 F.2d 914 (6th Cir. 1973)	29
Hoffman v. United States, 391 F.2d 195 (9th Cir. 1968)	14, 45
Holzsager v. Valley Hospital 446 F.2d 792 (2d Cir. 1981)	17, 22
Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981)	28
Johanning v. Johanning, 509 F.Supp. 770 (D.N.J. 1981)	27

	Page
Kalb v. Feuerstein, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940)	14, 15 50
Kamhi v. Cohen, 512 F.2d 1051, (2d Cir. 1975)	43
Kelser v. Anne Arundel County Dept. of Social Servs., 679 F.2d 1092 (6th Cir. 1981)	30, 32
L.H. v. Jamison, 643 F.2d 1351 (9th Cir. 1981)	27
Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982)	30, 38
Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667 (9th Cir. 1972)	15
McCarty v. McCarty, 453 U.S. 210, 101 S.Ct., 2728, 69 L.Ed.2d 589 (1981)	passim
Ohio ex rel Popovici v. Agler, 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 489 (1930)	35
Overman v. United States, 563 F.2d 1287, (8th Cir. 1977)	43

Page

Peterson v. Babbit,
708 F.2d 465
(9th Cir. 1983) 27

Propper v. Clark,
337 U.S. 472,
69 S.Ct. 1333, 93 L.Ed. 44

Railroad Commission of Texas
v. Pullman Co.,
312 U.S. 496, 61 S.Ct. 643,
85 L.Ed. 971 (1941) 44

Railroad Retirement Board
v. Alton R. Co.,
295 U.S. 330,
55 S.Ct. 758, 79 L.Ed.
1468 (1935) 20

Ridgway v. Ridgway,
454 U.S. 46, 102 S.Ct. 49,
70 L.Ed.2d 39 (1981) 14

Robertson v. Robertson,
523 F.Supp. 96,
(E.D. Pa. 1981) 27

Rowell v. Osterle,
626 F.2d 437
(5th Cir. 1980) 31

Ruffalo ex rel Ruffalo v.
Civiletti, 702 F.2d 710
(8th Cir. 1983) 38

Santa Fe Land Improvement Co.
v. City of Chula Vista,
596 F.2d 838,
(9th Cir. 1979) 45

Page

Shelter Framing Corp. v. Pension Benefit Guarantee Corp., 705 F.2d 1502 (9th Cir. 1983) 20

Solomon v. Solomon, 516 F.2d 1018 (3dCir. 1975) 27, 38

Sutter v. Pitts, 639 F.2d 842 (1st Cir. 1981) 36

Thrower v. Cox, 425 F.Supp. 570 (D.S.C. 1976) 43

United States v. City of New Haven, 447 F.2d 972 (2d Cir. 1971) 14

United States v. City of New Haven, 496 F.2d 452 (2d Cir. 1974), appeal dismissed, cert den, 419 U.S. 958 (1975) 14

United States v. Hellard, 322 U.S. 363, 64 S.Ct. 985, 88 L.Ed. 1326 (1943) 16

United States v. Larionoff, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed 2d 48 (1977) 18

United States v. Pink, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942) 14

Page

United States v. Security Industrial Bank, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982) 19, 20

United States v. Tarble, 80 U.S. 397, 20 L.Ed. 597 (1872) 15

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940) 15, 16

Wasserman v. Wasserman, 671 F.2d 832 (4th Cir. 1981) cert den 103 S.Ct. 372 (1982) 30

Welker v. Metropolitan Life Ins. Co., 502 F.Supp. 268 (C.D. Cal. 1980) 27

Wilson v. Wilson, 532 F.Supp. 371 (W.D. La. 1977) 28

Zak v. Pilla, 698 F.2d 800 (6th Cir. 1982) 36

STATE CASES:

Gillmore v. Gillmore, 113 Cal.App.3d 319, 169 Cal.Rptr. 811 (1980) 7

	Page
In re Marriage of Ankenman, 142 Cal.App.3d 833, 191 Cal.Rptr. 292 (1983)	22, 46
In re Marriage of Buikema, 139 Cal.App.3d 689, 188 Cal. Rptr. 856 (1983)	46
In re Marriage of Cullen, 145 Cal.App.3d 424, 193 Cal.Rptr. 590 (1983)	46
In re Marriage of Jacanin, 124 Cal.App.3d 67, 177 Cal.Rptr. 86 (1981)	20
In re Marriage of Luciano 104 Cal.App.3d 164, 164 Cal.Rptr. 93 (1980)	7
In re Marriage of Mahone, 123 Cal.App.3d 17, 176 Cal.Rptr. 274 (1981)	21
In re Marriage of Scott, 156 Cal.App.3d 251, 202 Cal.Rptr. 716 (1984)	7, 23
In re Marriage of Sheldon, 124 Cal.App.3d 371, 177 Cal.Rptr. 380 (1981)	21, 22
Morris v. McCauley's Quality Transmission Service, 60 Cal.App.3d 964, 132 Cal.Rptr. 37 (1976)	25
Painters Local Union No. 567 v. Tom Joyce Floors, Inc., 398 P.2d 245 (Nev. App. 1965)	15

STATUTES	Page
Title 10	
§ 688	4
§ 701	13
§ 802	4
§ 1408	passim
§ 3929	3, 13
§ 7721	3
Title 28	
§ 701	
§ 1254(1)	
§ 1331	43
§ 1332	43
§ 1361	
§ 1442a	2, 5
§ 1447	5
Title 37 U.S.C.	
§ 701	3, 13
MISCELLANEOUS:	
Comment, Federal Question Jurisdictiction and the Domestic Relations Exception: The Search for Parameters, 31 UCLA L.Rev. 843 (1984)	26, 31 37
8 California Family Law Report 2508 (1984)	52
Note, Subject Matter Jurisdiction, 66 Cornell L.Rev. 534 (1981)	26

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 736 F.2d 1367 and is set forth in Appendix B, infra. The order of the District Court dismissing the complaint in Fern v. Turman, et ano., D.C. No. CV 82-4821 (henceforth, the "Fern case"), for lack of jurisdiction, is not reported and is reproduced in Appendix C. The order of the District Court dismissing the complaint in Stirm v. Adams, et ano., D.C. No. CV 82-0749 (henceforth, the "Stirm case"), is also not reported and is reproduced in Appendix D.

JURISDICTION OF THIS COURT TO ENTERTAIN THE PETITION

The judgment of the Court of Appeals was entered on July 10, 1984. A timely request for an extension of time within which to file an application for Writ of Certiorari was filed and this Court entered an order dated October 1, 1984, extending

the time within which the application may be filed to and including November 8, 1984. A copy of that Order is set forth in Appendix F. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL JURISDICTION BEFORE THE DISTRICT COURT

In the Fern case, jurisdiction was invoked under 28 U.S.C. §§ 1331(a), 1332(b) and 1361. In the Stirm case, jurisdiction was invoked under 28 U.S.C. §§ 1331(a) and 1361.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case primarily involves the grant of diversity jurisdiction to district courts, 28 U.S.C. § 1332(a); federal question jurisdiction, 28 U.S.C. § 1331(a); and jurisdiction to compel performance of his duties by an officer of the United States, 28 U.S.C. § 1361.

Because this Petition is concerned only with whether the court below incorrectly decided the jurisdictional questions, the Petition does not raise questions on the merits of the dispute concerning Petitioners' entitlement to substantive relief. Nevertheless, for an understanding of the dispute on the merits, it is necessary to set out statutory and constitutional provisions describing Petitioners' claims. In this Petition, reference is therefore made to the following statutes:

Title 10 U.S.C. §§ 688(a); 1408(c)(1) and (3); 3929; 7721(a); and 8929

Title 37 U.S.C. § 701(a)

Title 28 U.S.C. §§ 1442a; 1447(d)

Except as set forth in the text, these statutes, along with Art. III, Sec. 2, Cl. 1, and the Due Process and Just Compensation clauses of Amendment V of the United States Constitution, are reproduced in pertinent part in Appendix A.

STATEMENT OF FACTS

A. PROCEDURAL HISTORY

Petitioner Robert Lewis Stirm, a highly decorated Air Force officer, returned from five and one-half years in a North Vietnamese prisoner-of-war camp, injured, to a divorce proceeding in which his wife claimed and secured from the Superior Court, San Mateo County, California, 42.7% of his military retired pay. The duration of his incarceration in North Viethan was included in the calculation of his wife's entitlement. The interlocutory and final decrees were entered in 1974. The jurisdiction of the divorce court to enter an order dividing military retired pay was not challenged. The decree did not award the ex-spouse spousal support, and she immediately remarried.

This Court decided McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 in June 1981. It there determined that federal law required that military retired

pay actually reach the retired officer in its entirety and that federal law which mandated this result preempted a conflicting application of California's community property regime which resulted in an ex-spouse taking part of the retirement pay. After McCarty, Stirm ceased making payments of retired pay to the ex-spouse. On February 1, 1982, the ex-spouse brought an action to enforce the dissolution decree in the family law court which Stirm removed to the district court under 28 U.S.C. § 1442a. [1] At the same time, Stirm filed an

---

[1] That section provides in pertinent part:

> A civil or criminal prosecution in the court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title or authority under a law of the United States respecting the armed forces thereof, . . . may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is pending in the manner prescribed by law,...

original action against the ex-spouse and against the Secretary of the Air Force.

As against the ex-spouse, Stirm claimed an entitlement to the entirety of his military retired pay and asserted that the 1974 divorce decree had issued without subject matter jurisdiction, insofar as it purported to dispose of his retired pay under California's community property scheme and not under federal law. Stirm grounded his entitlement to the entirety of his retired pay under the same provisions which the McCarty court had found sufficient to confirm the military officer's entitlement to the entirety of his retired pay (among others, these sections were 10 U.S.C. §§ 3929, 7721(a); and 37 U.S.C. 701(a)).

As against the Secretary, Stirm sought a determination that if he were to be deprived of a significant portion of his retired pay, he should not remain subject to

restrictions set out in the Code of Military Justice, 10 U.S.C. § 802(4); to court martial, and to recall to active service at the discretion of the Secretary, 10 U.S.C. § 688(a). Since retired pay represents reduced pay for reduced but continuing services rendered to the military by the officer, Stirm argued it would be inequitable and a violation of due process to apply the Code of Military Justice and to subject him to recall while redirecting his pay to another. Before the Secretary made any appearance in the case, the ex-spouse moved to remand the cause which Stirm had removed and to dismiss Stirm's original complaint filed in the district court.

By Order dated September 3, 1982, District Court Judge Spencer Williams determined that the removal of the enforcement action had been improvident and remanded the action to the family law court. He also concluded that Stirm's own claim did not "arise" under federal law; it was instead a

defense based upon federal law to the ex-spouse's state claim to enforce the 1974 divorce decree. With respect specifically to 28 U.S.C. § 1442a, Judge Williams found no "act" done under color of Stirm's office; the court held that the dispute "in no way involves the armed forces but rather a private dissolution proceeding between two parties." See Appendix D, p.8. 2/

2/ Stirm's argument before the District Court, not reflected in its opinion, was that § 1442a is an extraordinary provision which allows removal even if only the defense is based upon a federal issue encompassed by the statute. Stirm contended that his defense was contemplated by the statute since he claimed a "right" to retired pay by virtue of his "office" and "status" as a retired officer subject to court martial and to recall to active service. He argued that the statute is remedial and shows a concern that federal officers have access to a federal forum when rights which they assert associated with their military service are challenged under conflicting state law provisions.

The determination by Judge Williams that removal was improvident is not directly appealable (28 U.S.C. § 1447(d)), and is not part of the questions presented in this petition.

Judge Williams noted the discretionary nature of a request for declaratory relief and adverted to the marital exception in dismissing Stirm's complaint. ("Of course, federal courts traditionally have refrained from exercising jurisdiction over cases which in essence are domestic relations disputes." (Appendix D, p.9, f.n.3.) Stirm's appeal from the dismissal of his complaint was consolidated for briefing and argument with the appeal in Fern.

Petitioner Albert John Fern, Jr. had served on active duty with the Army for 28 years when the family court in Monterey County issued its interlocutory divorce decree in 1978 awarding the ex-spouse 45% of his Army retired pay. Fern had indicated to the family court that he wished to remain in active service until he could complete 30 years in order to secure a higher level of retired pay. However, the divorce decree

provided that if Fern (although then eligible) chose not to retire immediately from active service, he must nevertheless pay the allocable portion of his retired pay to his ex-spouse from his active duty pay.[3/]

After the divorce, Fern continued in active service for one year, paying the ex-spouse her allocable portion of his retired pay out of his current pay. However, he could not make ends meet with so little current pay remaining; compelled by the divorce decree's requirement, Fern retired during his twenty-ninth year of service in

---

3/ Under California law, community property principles and the division of retirement funds are deemed paramount to other interests: the spouse of a worker eligible for retirement may insist that she be paid her share of retirement benefits promptly; the working spouse may not compel the ex-pouse to defer receipt of his retirement benefits by continuing to work. This rule has been applied to military retired pay. Gillmore v. Gillmore, 113 Cal.App.3d 319, 169 Cal.Rptr. 811 (1980); In re Marriage of Luciano, 104 Cal.App.3d, 164 Cal.Rptr. 93 (1980); In re Marriage of Scott, 156 Cal.App.3d 251, 202 Cal.Rptr. 716 (1984).

1979 and began receiving retired pay. Following the decision in McCarty, supra, Fern ceased making payments to the ex-spouse.

On April 16, 1983 the ex-spouse brought an enforcement action in the family court, which Fern removed to the Northern District of California. He also filed an original action on September 9, 1982 against the ex-spouse and against the Secretary of the Army. Jurisdiction against the ex-spouse was predicated on diversity of citizenship, since the ex-spouse had remarried after the divorce and settled in Texas. In his complaint, Fern stated that he was entitled to the entirety of his retired pay. He collaterally attacked the 1978 divorce court judgment as lacking subject matter jurisdiction to dispose of 45% of his retired pay.

Fern separately challenged the authority of the divorce court to order him to pay his ex-spouse 45% of his retired pay out

of his active duty pay. He sought recoupment of sums which he had paid to the ex-spouse prior to retirement from active service. As against the Secretary, Fern asked for the same relief as had Stirm.

By Order entered on September 15, 1982, District Court Judge William A. Ingram remanded the ex-spouse's enforcement action to the Superior Court (Appendix E). Judge Ingram stated that removal was improper under either the diversity or federal questions statutes. He found no federal question, and stated that "cases involving domestic relations are exempted from the jurisdictional grant predicated upon diversity of citizenship."

By order entered on September 22, 1982, District Court Judge William W. Schwarzer dismissed Fern's federal complaint with a quote from Ex parte Burrus, 136 U.S. 586, 593-94, 10 S.Ct. 850, 853, 34 L.Ed. 500, 503 (1890), that "the whole subject of the domestic relations of husband and

wife ... belongs to the laws of the states, not to the laws of the United States." He dismissed the complaint for lack of subject matter jurisdiction based upon the marital exception in diversity cases and denied leave to amend to assert federal question jurisdiction on the ground that the federal matter in the complaint only anticipates a federal defense and is not adequate to support the claim as one arising under federal law. On September 28, 1982 Fern appealed the court's dismissal and his appeal was consolidated with the Stirm case.

The Ninth Circuit affirmed both dismissal orders of the District Court on the basis of the proper exercise by both district judges of discretion to apply the marital exception. The "issues involved are closely related to the issues within the domestic relations exception and considerations of comity and policy counsel against federal court intervention."

(Appendix B, p.5) Although the divorces had become final many years ago, both ex-spouses had remarried, and no issue had been raised concerning spousal or child support, the Appeals Court nevertheless felt that if in the application of federal law the retired pay divisions were invalidated, "[s]uch a decision would likely require the state courts to determine whether compensating alterations in the decree, such as the addition or alteration of support terms, are necessary." (Appendix B, p.6.) By applying the marital exception, the lower federal courts would avoid the "duplicative and piecemeal litigation, and the resulting potential [for] inconsistent state and federal decrees." (Id.)

The lower court also rejected the officers' contentions that their claims arise under federal law because their rights to military retired pay are determined by federal statute. Instead, the court considered the officers' claims to be merely

defenses to the state claims of the ex-spouses. With respect to the officers' claims against the Secretaries of the Army and the Air Force, the court concluded that the issues were not ripe for judicial decision. Until the state court proceedings have been concluded and each Secretary had actually recalled the officer to active service, the claims against the Secretaries were merely "contingent," "not yet final" and lacked a "threat of significant and immediate impact." (Appendix B, p.4.)

B. ARGUMENTS PRESENTED TO THE LOWER COURT ON THE MERITS OF THE SUBSTANTIVE DISPUTE.

The military officers' arguments to the Ninth Circuit on the merits of the disputes are neither frivolous or insubstantial. Although not included within the questions presented for the grant of the writ, the arguments on the merits provide helpful background to the consideration of the jurisdictional issue. If this Court grants

the Writ and petitioners prevail in the Court's plenary consideration of the jurisdictional issues, petitioners' claims are likely to prevail on the merits of the dispute in a subsequent lower court review of their claims.

Petitioners claimed below that they were entitled to a determination by a federal court that the Congress had safeguarded military retired pay to the serviceman as his personal entitlement free from claim to division under state law by an ex-spouse. The statutory bases for this exclusive entitlement are in 10 U.S.C. §§ 701(c), 3929, and in 37 U.S.C. § 701. This Court in McCarty v. McCarty, supra, determined that these statutes require such a result and supplant state law.

The officers argued that although res judicata is an affirmative defense which mandates repose, that doctrine cannot avail the ex-spouses because the 1974 and 1978

dissolution judgments were void, of no affect, and could not be enforced. In a collateral attack based upon federal legislation paramount to conflicting state law, a prior state court judgment raised in defense can be successfully resisted.[4/] A court that applies preempted state law has acted

---

4/ See, e.g., Ridgway v. Ridgway, 454 U.S. 46, 102 S.Ct. 49, 102 S.Ct. 49, 70 L.Ed. 2d 39 (1981) (divorce court judgment applying state law invalidated by preempting federal law); United States v. Pink, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942) (state court judgment applying state law in conflict with exercise by President of foreign relations power); Kalb v. Feuerstein, 308 U.S. 433, 60 S.Ct. 343, 80 L.Ed. 370 (1940) (state court judgment applying state law interferes with operation of bankruptcy laws); United States v. City of New Haven, 447 F.2d 972 (2d Cir. 1971) (state court judgment applying state law to regulate air space invalidated by pervasive federal law); United States v. City of New Haven, 496 F.2d 452 (2d Cir. 1974), appeal dismissed, cert. den. 419 U.S. 958 (1975) (same); Hoffman v. United States, 391 F.2d 195 (9th Cir. 1968) (divorce court judgment invalidated in federal court). Cf. Carpenters' Pension Trust, etc. v. Kronschnabel, 460 F.Supp. 978 (C.D. Cal. 1978), aff'd 632 F.2d 745 (9th Cir. 1980), cert. denied, 453 U.S. 922 (1981) (collateral attack on divorce decree, but no preemption found).

without subject matter jurisdiction.[5] Federal preemption cases represent, upon compelling public policy grounds, one of the rare exceptions to doctrines based upon the

---

[5] See, United States v. Tarble, 80 U.S. 397, 402, 20 L.Ed 597, 598 (1872) ("question presented may be more generally stated ... whether any judical officer of a state has jurisdiction"); Painters' Local Union No. 567 v. Tom Joyce Floors, Inc., 398 P.2d 245 (Nev. App. 1965) ("preemption ... deprives a state of jurisdiction over matters embraced by a congressional act regardless of whether the state law coincides with, is complimentary to, or opposes the federal Congressional expression.") In a collateral attack on a state court judgment which gives effect to preempted state law, the district court must declare "that the Superior Court has attempted in its order to assert dominion over an asset which the United States Congress has put beyond its reach." Hoffman v. United States, 391 F.2d 195, 196 (9th Cir. 1968). Application of the preempted and, hence, invalid state law is "unconstitutional, illegal and void." Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667, 676 (9th Cir. 1972). The state law is "void," a "nullity." Kalb v. Feuerstein, 308 U.S. 433, 438-39, 60 S.Ct. 343, 346, 80 L.Ed. 370 (1940); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512, 60 S.Ct. 653, 656, 84 L.Ed 894 (1940); Carpenters' Pension Trust, etc. v. Kronschabel, 460 F.Supp. 978, 980 (C.D. Cal. 1978), aff'd. 632 F.2d 45 (9th Cir. 1980), cert. den., 453 U.S. 922 (1981).

finality of judgments.[6/]

If the state court judgments are invalid due to purely jurisdictional considerations, no question arises concerning the retroactive application of McCarty. It was not the Supreme Court which in McCarty preempted state law; that had long ago -- in the beginning of relevant time -- been done by the Congress. The McCarty court only stated that which had existed all along, but

---

6/ United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514-15, 60 S.Ct. 653, 657, 84 L.Ed. 894 (1940) (there are "areas, including lack of jurisdiction, in which competing policies to that of repose, justify collateral attack"); United States v. Hellard, 322 U.S. 363 64 S.Ct. 985, 88 L.Ed 1326 (1943) (prior state court judgment void because of overriding federal interests in safeguarding Indian-owned land); Durfee v. Duke, 375 U.S. 106, 114, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963) ("[d]octrines of federal premption ... may in some contexts be controlling" as against res judicata). See, Note, "Subject Matter Jurisdiction", 66 Cornell L.Rev. 534, 541-543 (1981) ("special exception to the modern finality approach for subject matter jurisdiction when the collateral attack would serve an important policy extrinsic to the judicial system.")

which had been ignored by the state divorce courts when they divided military retired pay. In any event, however, "by definition, a jurisdictional ruling may never be made prospective only." Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981). See, Holzsager v. Valley Hospital, 446 F.2d 792, 798 (2d Cir. 1981) (concurring opinion).

After the military officers appealed to the Court of Appeals, the Former Spouses' Protection Act, 10 U.S.C. § 1408, Public Law No. 97-252 (hereinafter "FSPA") entered on February 1, 1983 into force. That new provision states in subsection (c)(1) that a state court "may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." However, Subsection (c)(3) states that the new legislation "does not

authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section."

Before the Ninth Circuit, the retired officers confronted the new legislation for the first time, arguing that it is the law in effect at the time of the appeal which governs the disposition of the case. Bradley v. School Board, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). The officers contended that if their retired pay had been fully earned as of the date of their retirement, the Congress could not, under the Just Compensation clause of the Fifth Amendment, divest them of their retired pay, without compensation. United States v. Larionoff, 431 U.S. 864, 879, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977) (retroactive application of legislation eliminating bonuses for military personnel would raise serious Fifth Amendment difficulties); Costello v. United States,

587 F.2d 424, 427 (9th Cir. 1978), cert. den. 442 U.S. 929 (1979) (court would "proceed on the assumption, arguendo, that if retirement pay [for military personnel] had been fully earned at the date of retirement it could not be divested without compensation"). Cf., United States v. Security Industrial Bank, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982) (governmental action that would retroactively result in benefitting debtors in bankruptcy by impairing property interests of creditors holding secured liens constitutes a Fifth Amendment taking).

When the Congress in the FSPA changed the rules after the military officers had completed more than 20 years service under the old rules, a Fifth Amendment taking occurred: the new rules operate to deprive the officers of that property which was theirs as having already been fully earned. The taking of property from one and transferring it to another without

compensation is an uncompensated taking. Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 357, 55 S.Ct. 758, 79 L.Ed 1468 (1935); Shelter Framing Corp. v. Pension Benefit Guarantee Corp., 705 F.2d 1502 (9th Cir. 1983).

It is not necessary that the government acquire for itself the property in question; governmental action in shifting a portion of an officer's retired pay to his ex-spouse is as much an impermissible taking as if the funds had first gone to the U.S. Treasury and had then immediately been routed by the government to the ex-spouse. See, United States v. Security Industrial Bank, supra.

The military officers seek a federal forum because the California state courts have been uniformly hostile to the analysis and result reached in McCarty. In its first post-McCarty opinion, the California Court of Appeal criticized the McCarty majority and extolled the dissent. In re Marriage of Jacanin, 124 Cal.App.3d 67, 70, 177

Cal.Rptr. 86, 87 (1981). Since then the state appeals court has refused to apply the reasoning in McCarty to a case in which the parties had entered into an agreement which included a division of retired pay, In re Marriage of Sheldon, 124 Cal.App.3d 371, 177 Cal.Rptr. 380 (1981); or to a case in which the trial court had already rendered a decision against the military officers, but the decision was on appeal at the time of the McCarty decision, In re Marriage of Mahone, 123 Cal.App.3d 17, 176 Cal.Rptr.274 (1981).

With respect to divorce court allocations of military retired pay which were final at the time McCarty was announced, the state appeals court has not applied the test set out in Firestone Tire & Rubber Company v. Risjord, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981) for retroactive application of a Supreme Court decision finding lack of jurisdiction. Instead, the state court has carefully

employed Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) as its authority for a non-retroactivity determination. See, e.g., In re Marriage of Sheldon, supra. The Chevron test, however, clearly applies only to a change in substantive rules of law and not to determinations relating to lack of jurisdiction. Holzsager v. Valley Hospital, 446 F.2d 792, 798 (2d Cir. 1981) (concurring opinion).

When the FSPA entered into force, the state appellate court at its earliest opportunity determined that the statute was valid as against a due process challenge. It came to this conclusion in a case in which neither party had raised a constitutional question (and when invited by the court to address the constitutional issues refused to do so). In re Marriage of Ankenman, 142 Cal.App.3d 833, 838, 191 Cal.Rptr. 292, 294 (1983).

The State Appellate Court has recently determined that notwithstanding the limita-

tion in the FSPA at § 1408(c)(3), that a state court not direct an officer to retire from the military, the state courts are free to demand that the retired officer begin making payments of retired pay while on active duty if he prefers not to retire. The determination was made in the face of the language and the history of the new statutory provisions. In re Marriage of Scott, 156 Cal.App.3d 251, 202 Cal.Rptr. 716 (1984).

Indeed, the state divorce courts have recently begun invalidating prior final divorce court judgments rendered after McCarty and before the FSPA entered into force; they have refused to apply res judicata principles to their own final decrees when such decrees benefitted the military officers. E.g., in In re Marriage of Southwick (San Francisco Superior Court No. 759565), a final judgment of dissolution entered on April 8, 1982 that had confirmed to the husand sole entitlement to his

military retired pay pursuant to McCarty, was modified by order entered on October 3, 1984 so as to award the ex-spouse a portion of the military retired pay.

Moreover, a divorce court has just recently overturned the McCarty decision itself in an order involving the very same parties, Dr. Richard John McCarty and his ex-spouse. The San Francisco Superior Court, No. 715268, held that the Supreme Court decision in McCarty is no bar to granting Mrs. McCarty the very same benefits that the earlier opinion of the Supreme Court had denied her.

In the Superior Court proceedings in Fern and Stirm following remand, the family courts in each case made short shrift of the officers' claims to federal entitlements and granted the ex-spouses enforcement of their claims. The state determinations are now on appeal where the result appears to be pre-ordained. The family court decisions, because not yet final, have no res judicata

effect under California law. Morris v. McCauley's Quality Transmission Service, 60 Cal.App.3d 964, 132 Cal.Rptr. 37 (1976).

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS AS TO THE SCOPE TO BE GIVEN TO THE MARITAL EXCEPTION TO THE EXERCISE OF FEDERAL JURISDICTION.

1. The decision below conflicts with decisions in other circuit courts which have considered whether federal judges have discretion to reject jurisdiction by invoking the marital exception where the relief requested does not concern the traditional core elements of the exception -- divorce, custody or support. The decision below reflects the maximalist position of the Ninth Circuit which gives broad scope to the exception. Courts in the Ninth Circuit dismiss "almost any case involving married couples or their children." 7/ The Third Circuit, like the

---

7/ "Federal Jurisdiction and the Domestic Relations Exception: The Search For Parameters", 31 U.C.L.A. L.Rev. 843, 860 (henceforth "Federal Juris-diction"). See, e.g., Armstrong v. Armstrong, 696 F.2d 1237 (9th Cir. 1983) (exception applies to claim by military retired officer for determination

(footnote continued on next page

Ninth Circuit, also applies the marital exception broadly. 8/

(footnote continued from previous page)

of entitlement to military retired pay); Peterson v. Babbitt, 708 F.2d 465 (9th Cir. 1983) (per curiam) (exception applies in action by father in state prison against state authorities for denial of visitation rights with minor children); Csibi v. Fustos, 670 F.2d 134 (9th Cir. 1982) (exception applies in diversity action by decedent's first wife and children to establish rights in decedent's estate); L. H. v. Jamieson, 643 F.2d 1351 (9th Cir. 1981) (exception applies in class action on behalf of dependent, neglected, or delinquent children); Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968) (exception applies in diversity action to establish paternity and obtain child support). See also, Welker v. Metropolitan Life Ins., Co., 502 F.Supp. 268 (C.D. Cal. 1980) (exception applies in action by woman seeking to be declared putative wife of decedent); Bacon v. Bacon, 365 F.Supp. 1019 (D.Or. 1973) (exception applies in diversity action where ex-wife sought damages from former husband for intentional infliction of emotional anguish).

8/ See, e.g., Solomon v. Solomon, 516 F.2d 1018 (3rd Cir. 1975); Albanese v. Richter, 161 F.2d 688 (3rd Cir.), cert. den., 332 U.S. 782 (1947). See also Fusorro v. Fusoro, 550 F.Supp. 1260 (E.D. Pa. 1982); Lewis v. Lewis, 543 F.Supp. 35 (N.D. Pa. 1981); Robertson v. Robertson, 523 F.Supp. 96 (E.D. Pa. 1981); Allen v. Allen, 518 F.Supp. 1234 (E.D. Pa. 1981); Johanning v. Johanning, 509 F.Supp. 770 (D.N.J. 1981).

By contrast, the Fifth Circuit accords the marital exception a much narrower scope. 9/

Unlike the Ninth and Third Circuits, the Fifth Circuit has exercised jurisdiction in actions in which the plaintiff seeks alimony and child support in arrears; 10/ It also

---

9/ See, e.g., Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981) (the exception held not to apply in a diversity action for past-due alimony and child support pursuant to a state decree); Erspan v. Badgett, 647 F.2d 550 (5th Cir. 1981), cert. den., 455 U.S. 945 (1982) (exception not applied in a diversity action to enforce terms of a divorce decree); Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978) (exception did not apply to a claim for damages caused by breach of a separation agreement). See, also, Wilson v. Wilson, 532 F.Supp. 152 (M.D. La. 1980), aff'd. 667 F.2d 497 (5th Cir. 1982) (exception did not apply in a diversity action to enforce out-of-state divorce decree); Lee v. Hunt, 431 F.Supp. 371 (W.D. La. 1977) (exception not applied in a diversity action seeking declaration of status as a putative wife in order to acquire rights in an estate).

10/ See, e.g., Jagiella v. Jagiella, 647 F.2d 561, 564 (5th Cir. 1981) ("since the arrearages here in question were calculable solely from the records of the Clerk of the Florida Circuit Court and involved no litigation of questions regarding the parties' marital relationship, we conclude that the district court properly exercised jurisdiction").

exercises jurisdiction in cases involving damages for breach of separation agreements.[11]

There is confusion and conflict among the other circuits as well. The First, Second, and Sixth Circuits give a broad construction to the exception in the diversity area, [12] the Fourth, Seventh, Eighth and D.C. Circuits construe the

---

[11] See, e.g., Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978) ("while we approvingly acknowledge the so-called domestic relations exception to diversity jurisdiction, we find it inapplicable to the instant case, which involves little more than a private contract to pay money between persons long since divorced, whose children are well into adulthood").

[12] See, e.g., Armstrong v. Armstrong, 508 F.2d 348 (1st Cir. 1974); Kamhi v. Cohen, 512 F.2d 1051 (2d Cir. 1975); Firestone v. Cleveland Trust Co., 654 F.2d 1212 (6th Cir. 1981); Gargallo v. Gargallo, 487 F.2d 914 (6th Cir. 1973) (per curiam).

exception more narrowly. [13] The circuits which restrict the scope of the exception focus upon whether the conflict involves an inquiry into mere property rights; if so, the domestic relations exception will not apply. The maximalists circuits which give broad scope to the exception hold that a

---

[13] See, e.g., Kelser v. Anne Arundel County Dep't. of Social Servs., 679 F.2d 1092, 1095 (4th Cir. 1982) (court has jurisdiction to hear civil rights action with domestic relations backdrop); Wasserman v. Wasserman, 671 F.2d 832 (4th Cir.), cert. den., 103 S.Ct. 372 (1982) (exception would not apply in action to recover damages for child enticement, intentional infliction of emotional distress, and conspiracy relating to removal of children from custodial parent by other parent); Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980) (exception not applicable to tort claims between former spouses); Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982) (tort actions between former spouses); Ruffalo ex rel Ruffalo v. Civiletti, 702 F.2d 710, 717 (8th Cir. 1983) (exception no bar to granting an injunction to compel return of a child by non-custodial parent in accordance with state custody decree); Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982) (domestic suits which sound in tort or contract and which do not exceed the federal court's competence should be heard).

determination of spousal status is itself a primary issue in the case and justifies dismissal of an action for lack of subject matter jurisdiction under the exception. 14/

2. The decisions below extend the marital exception to the federal question context. (Appendix B, p.5; Appendix D, p.9, f.n.3). However, the Fifth Circuit in Franks v. Smith, 717 F.2d 183, 185 (5th Cir. 1983), after careful consideration refrained from applying the exception outside the diversity context. 15/

Like the Ninth Circuit, the Sixth Circuit refuses to entertain a federal question suit which involves domestic

---

14/ The cases are collected and analyzed in Comment, "Federal Jurisdiction" 31 U.C.L.A. L.Rev. 843, 855-865 (1984).

15/ See also, Rowell v. Oesterle, 626 F.2d 437, 438 (5th Cir. 1980) (per curiam) ("this general rule [i.e., the marital exception], however, has not operated to bar federal review of constitutional issues, simply because those issues arise in 'domestic contexts.'").

matters. [16] However, the Fourth Circuit disagrees and has held that a civil rights action in an interfamilial context is outside the domestic relations exception. Kelser v. Anne Arundell County Dep't. of Social Servs., 679 F.2d 1092 (4th Cir. 1982).

3. The decision below directly conflicts with the decision in Erspann v. Badgett, 647 F.2d 550 (5th Cir. 1981), supplemental opinion, 659 F.2d 26 (1981), cert. den., 455 U.S. 945 (1982). In Erspann, a divorced wife brought suit in federal district court, invoking diversity jurisdiction, to enforce a Texas divorce decree which had awarded her an interest in her former husband's Army retired pay. The

---

[16] Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981) ("Even when brought under the guise of a federal question action, a suit whose substances is domestic relations generally will not be entertained in federal court").

defendant military officer contended "that under the 'domestic relations' theory of federal abstention, the district court should have refused to assert jurisdiction in this case." 647 F.2d at 553. The Fifth Circuit refused to apply the marital exception, noting that the case "involves none of the concerns upon which the domestic relations exception rest." Id.

Erspann cannot be reconciled with the decision below. The cases are in direct conflict, because the Ninth Circuit, unlike the Fifth, proceeds from different premises concerning the scope and appropriateness of the marital exception. 17/

17/ In its supplemental opinion, the Erspann court reached the merits of the husband's claim that the decision in McCarty allowed him to defend against the wife's enforcement action. However, the husband offered no explanation why res judicata should not be accorded to the wife's prior divorce court award and the circuit court give no indication that it had before it any

(footnote continued)

Conflicting determinations by the various circuit courts concerning which family-background diversity and federal question cases may be considered by a federal court must be harmonized. Separate bodies of law concerning federal jurisdiction are developing with conflicting results, conflicting rationales, and the hopeless confusion of premises, technical concerns, and policy justifications. This Court should harmonize the inconsistent positions of the federal courts by granting the application for a Writ and then providing definitive guidelines in this troublesome area of federal jurisdiction.

II. THE ISSUES ARE IMPORTANT

1. The scope of the marital exception affects numerous litigants and covers a wide variety of situations. Although the exception is over 100 years old, this Court

---

(footnote continued from previous page)
contention that the divorce court award was void for lack of subject matter jurisdiction.

has never offered guidelines to define its contours; never explained the conceptional underpinnings of the exception in light of the "all civil cases" language in §§ 1331(a) and 1332(a); and never explained just where the exercise of discretion to abstain shades off into an impermissible refusal to exercise jurisdiction.

The marital exception originated in 1858 in the dictum in Barber v. Barber, 62 U.S. (21 How.) 582, 16 L.Ed. 226 ("we disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or the allowance of alimony"); this dictum was enlarged in Ex parte Burrus, 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890). The exception was recognized in 1930 in Ohio ex rel Popovici v. Agler, 280 U.S. 379, 50 S.Ct. 154, 74 L.Ed. 489, where the Court stated that the federal courts had no jurisdiction over an action for divorce and alimony. Since 1930 the Court has not further dealt with the doctrinal matter.

However, since 1930, family law has developed in new ways that could not earlier have been foreseen. In the federal question area the determination of important constitutional questions arise in domestice settings, Franks v. Smith, 717 F.2d 183 (5th Cir. 1983) (exception rejected). Civil rights actions arise from domestic disputes. See, e.g., Zak v. Pilla, 698 F.2d 800 (6th Cir. 1982) (exception applied); Sutter v. Pitts, 639 F.2d 842 (1st Cir. 1981) (exception applied). Property interests associated with divorce have undergone radical changes both in community property states and in states that employ systems of equitable distribution in times of divorce. Moreover, the social agenda as its relates to the rights of spouses and ex-spouses against each other and against government officials has developed with great complexity. Causes of action not heard of in the time of the Barber dictum are now commonplace.

Federal Judges cannot turn a blind eye to changes in the social agenda affecting family law in the past 100 years and, as the Ninth, Third, and certain other circuits prefer to do, close their doors whenever the nastiness of an intrafamilial dispute threatens to disturb the decorum of the federal courthouse.

The dicta in the early opinions of this Court are not all-purpose brooms useful to sweep cases off congested calendars. The marital exception is too often used in perplexing fashion, used, as here, arbitrarily. The problem is too widespread to be ignored. 18/

2. There is no conceptual justification for expanding the marital exception beyond the areas of its core concerns. The historical derivation for the exception -- based upon the power of the

18/ See, cases collected in "Federal Jurisdiction" 31 UCLA L.Rev. 843-885 (1984).

English ecclesiastical courts [19]-- offers no convincing rationale as to why the exception should be continued and expanded into new areas beyond cases directly involving divorce and alimony. Some courts have doubted the validity of the historical explanation altogether. See, Ruffalo ex rel Ruffalo v. Civiletti, 702 F.2d 710, 717 (8th Cir. 1983); Lloyd v. Loeffler, 694 F.2d 489, 491-92 (7th Cir. 1982); Solomon v. Solomon, 516 F.2d 1018, 1030-33 (3d Cir. 1975) (dissent).

Moreover, the modern policy reasosns for the exception that domestic relations cases involve distasteful proof, require specialized attention or concern vexatious matters refer only to the core concerns associated with the exception and not to property disputes that arise in the context

[19] Barber v. Barber, 62 U.S. (21 How.) 582, 604-05, 16 L.Ed. 226 (1858) (Dissent); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 513 (2d Cir. 1973).

of a dispute between ex-spouses. Certainly these policy reasons do not explain why certain circuits seek to expand the application of the exception in widening arcs.

The present case is an excellent opportunity for this Court to resolve these important issues and to provide definitive guidance as to how far the exception extends.

III. THE DECISION BELOW IS ERRONEOUS

The marital exception should not have been invoked to deny either federal question or diversity jurisdiction. The District Court was not asked to grant a divorce; to determine alimony or support obligations; or to resolve the conflicting claims of divorced parents to custody of their children. The marital exception represents a simple expression of the more familiar doctrine of exclusive jurisdiction: state legislatures have granted family law courts exclusive jurisdiction over such matters as divorce and alimony. The power to grant a divorce, award custody or support lies exclusively in the state courts. The federal courts are powerless to act in these areas. However, under this familiar reasoning, there is no justification for expanding the marital exceptions beyond its core boundaries. Courts in the Fourth and Fifth Circuits (e.g., Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980); Franks v. Smith, 717

F.2d 183 (5th Cir. 1983) recognize the importance of not expanding the marital exception beyond its core elements.

The mere fact that a claim to federally-created statutory benefits rises in a domestic relations context should not bar consideration of the dispute by a federal court. An action involving a federal question which arises in a familial setting should be treated by federal courts in the same manner as all other federal question actions: if, in such a case, it is determined that the asserted federal statutory or constitutional claim is wholly insubstantial or frivolous or immaterial to the case (asserted solely for the purpose of obtaining federal jurisdiction) the action may be dismissed for lack of subject matter jurisdiction just as in any other case.

On the other hand, if the claimed violation is material to the case and is not technically insubstantial or frivolous, the claim should be determined by the federal

court. Cf. Franks v. Smith, 717 F.2d 183 (5th Cir. 1983).

If there is diversity jurisdiction, the court should determine whether it may grant the relief requested pursuant to the state law provision invoked by the complaining party. If state legislation has not reserved exclusive jurisdiction to the state courts to grant the specific relief requested, (i.e., to grant divorce, child custody or support), the federal court should proceed to exercise the jurisdiction granted to it by the Congress in implementation of Article III, Sec. 2, Cl.1 of the Constitution.

2. No policy considerations here justify the application of the exception. No California state law is here involved. The law invoked in each of the complaints is federal law. Family law courts have no special claim to expertise or experience superior to federal judges in considering the Constitutional or federal-law doctrines

pertaining to the merits of the dispute. Moreover, only property interests are here involved. The marriage has long ago terminated. There are no continuing incidents of alimony or child support. The mere fact that the issues arise within the context of a dispute between a military officer and former spouse is no reason to reject jurisdiction on policy grounds.

3. Federal courts may not expand the marital exception so as to keep their "federal hands off" (Kamhi v. Cohen, 512 F.2d 1051, 1056 (2d Cir. 1975)) the "vexatious" (Thrower v. Cox, 425 F.Supp. 570, 573 (D.S.C. 1976) "domestic relations imbroglio" (Overman v. United States, 563 F.2d 1287, 1292 (8th Cir. 1977).

Congress has declared that federal jurisdiction exists in "all civil cases" 28 U.S.C. §§ 1331(a), 1332(a), arising within the context of a federal question raised in the complaint or presented where diversity jurisdiction exists. Congress provided no

exception to the exercise of jurisdiction. In Article III of the Constitution it is "all cases at law or in equity" which are committed to the federal courts in federal-question and diversity contexts. Judge-made exceptions to these all-encompassing formulations must not "enervate" the force of these commands. See, Propper v. Clark, 337 U.S. 472, 490, 69 S.Ct. 1333, 98 L.Ed. 1480 (1949).

4. The doctrine of abstention does not here apply. Under Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 500-502, 61 S.Ct. 643, 85 L.Ed. 971 (1941), and its progeny, a federal court retains jurisdiction but abstains from ruling pending a determination by a state court that would resolve a state law question and perhaps make it unnecessary to decide a federal constitutional question.

The Ninth Circuit has stated that three criteria must be met for Pullman abstention to be applicable: (1) The complaint

"touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." (2) "The constitutional adjudication plainly can be avoided if a definitive ruling on this state issue would terminate the controversy." (3) The possibly determinative issue of state law is doubtful. Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838, 839-40 (9th Cir. 1979) (quoting Canton v. Spokane School Dist. No. 81, 498 F.2d 840, 845 (9th Cir. 1974)).

None of these criteria here apply. A collateral attack which challenges the power of the family court to have disposed of military retired pay in 1974 and 1978 does not touch a sensitive area of social policy. Cf. Hoffman v. United States, 391 F.2d 195 (9th Cir. 1968). The matter simply involves a garden-variety defense of res judicata based upon a decree which each petitioner contends was void for lack of

subject matter jurisdiction. As to the second element, there is no state issue upon which the state courts can rule which would terminate the controversy. The state court must rule on federal law.

Finally, there is no doubt as to how the state courts will rule in any matter touching upon McCarty. The California courts have indicated their preference with respect to post McCarty claims concerning military retired pay. They have always held against the retired military officer. See, e.g., In re Marriage of Cullen, 145 Cal.App.3d 424, 193 Cal.Rptr. 590 (1983); In re Marriage of Ankenman, 142 Cal.App.3d 833, 191 Cal.Rptr. 292 (1983); In re Marriage of Buikema, 139 Cal.App.3d 689, 188 Cal.Rptr. 856 (1983).

Another form of abstention, established in Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), seeks to avoid needless conflict with the state's administration of its own affairs. However,

Burford abstention only applies where there is a predominant state interest in carrying out its domestic policy. Although Burford-type abstention calls for dismissal of the action, there is no reason to apply such abstention when it cannot be said that the California legislature has sought to concentrate issues involving military retired pay and the relationship of the retired officer to the military in family courts.

It is ironic that the lower court would defer to the state courts given the notoriously unfriendly attitude of the state courts to any claim which challenges the state's community property scheme as conflicting with supervening federal law. (See, McCarty v. McCarty, supra, and prior decisions discussed therein arising in California and involving conflicts between community property concerns and federal law.)

The refusal by the courts below to entertain petitioners' claim is also insensitive to the Congressional concern of ensuring a federal forum to the military officer, even where the officer presents only a federal defense to a state complaint based upon state law. Although § 1442a is here not directly relevant, the solicitude expressed by the Congress in this rare instance of allowing a federal defense to suffice to confer the jurisdiction of the federal court should counsel federal courts not to rush to defeat the claims of military officers under discretionary or attentuated jurisdictional grounds.

5. The claims of the military officers here do arise under federal law and implicate important federal interests. The key element is that the earlier divorce decrees are a nullity. It is as if the officers were raising their claims for the first time and there had been no prior adjudication dividing their retired pay. In

that event it would have not been suggested that the officers' claims were only defenses to claims arising under state law. Here, there are no state claims, since the state courts prior to the FSPA could not dispose of military retired pay under state community property formulas.

6. The claims made by the military officers have been approved and validated by this Court in McCarty. The wife's res judicata claim is merely a matter in defense. See, Rule 8(c), Federal Rules of Civil Procedure. It is quite arbitrary for the lower court to insist that it is the enforcement action which is the main claim and the officers' claim under federal law which constitutes matter in defense. The officers were entitled to file their

original complaints directly invoking federal law. 20/

7. The claims of the military officers against the Secretary of each service, brought under §§ 1331(a) and 1361, are substantial and should of themselves have prevented the dismissal of the complaint.

The Secretary is an important, indeed necessary party to the requested determination in each case, and this court has

---

20/ See, Kalb v. Feuerstein, 308 U.S. 433, 438, 60 S.Ct. 343, 84 L.Ed. 370 (1940) ("But if appellants are right in their contention that the federal Act of itself, from the moment the petition was filed and so long as it remained pending, operated in the absence of the bankruptcy court's consent, to oust the jurisdiction of the state court so as to stay its power to proceed with foreclosure, to confirm a sale, and to issue an order ejecting appellants from their farm, the action of the Walworth County Court was not merely erroneous but was beyond its power, void, and subject to collateral attack. And the determination whether the Act did so operate is a construction of that Act and a federal question.")

jurisdiction under § 1361 against each Secretary. A long line of federal cases, cited in the McCarty decision at 453 U.S. 222, 101 S.Ct. 2736, 69 L.Ed.2d 600, f.n. 15, makes it clear that military pay is reduced compensation for current but reduced services by the retired officer. For a state court to take away retired pay after it has been fully earned by the officer directly interferes in the employer-employee relationship between the officer and the military.

The lower court suggests that referring the military officers to the state courts will avoid piecemeal resolution of the dispute. But in the state courts the Secretaries of the services are not parties, nor can they be made parties. Instead of promoting resolution of the dispute in one forum, the determinations of the lower court achieves the opposite result: promotes piecemeal litigation since the retired officers must separately proceed against the

Secretaries if they are to have comprehensive relief.

8. The violation of the federal law prohibition against compelling early retirement (10 U.S.C. § 1408(c)(3)) independently supports federal jurisdiction. Petitioner Fern was compelled to retire, because the divorce court had directed that he make immediate payments of his retired pay to his ex-spouse despite his desire to remain in active service. Even here, the Ninth Circuit in the opinion below will countenance no collateral attack and relegates the military officer to his state court remedy. The opinion below ignores the fact that it is federal law, now proceeding beyond McCarty and enshrined in the FSPA itself, 10 U.S.C. § 1408(c)(3), which prohibits a state court from bringing about such a result. Cf., Comments, 8 California Family Law Report 2508 (1984).

Surely in the Fern case the lower court should have retained jurisdiction of the

officer's claim under federal law to entitlement to his active duty pay free from the claims of his ex-spouse under the family court award.

IV. CONCLUSION.

For reasons set forth herein, the Court is requested to grant the petition and to issue a Writ of Certiorari to the Ninth Circuit Court of Appeals for each of the questions presented.

Dated: November 8, 1984.

Respectfully submitted,

KAPLAN, RUSSIN, VECCHI,
EYTAN & COLLINS

By _____
Mattaniah Eytan

Attorney for
Petitioners

APPENDIX

Texts of Constitutional Provisions and Statutes Referred to in Memorandum

Constitutional Provisions

Art. III. Sec. 2, Cl 1.

The judicial Power shall extend to all Cases in Law and in Equity, arising under this Constitution, the Laws of the United States, *** to Controversies *** between Citizens of different states, ***

Amendment V (Due Process of law).

*** nor be deprived of life, liberty, or property, without due process of law; ***

Amendment V (Just Compensation for Property).

*** nor shall property be taken for public use, without just compensation.

Statutes

10 U.S.C. § 688.

(a) Under regulations prescribed by the

Secretary of Defense, a retired member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps may be ordered to active duty by the Secretary of the military department concerned at any time. The Secretary concerned may, to the extent consistent with other provisions of law, assign a member ordered to active duty under this section to such duties as the Secretary considers necessary in the interests of national defense.

10 U.S.C. § 802 (Military Justice Act, Persons Subject to this Chapter).

(a) The following persons are subject to this Chapter:

* * * * *

(4) retired members of a regular component of the armed forces who are entitled to pay.

10 U.S.C. § 3929 (Computation of Old Age Retired Pay).

A member of the Army, retired under this chapter, is entitled to retired pay computed under Chapter 371 of this title.

10 U.S.C. § 2771 (Final Settlement of Accounts: Deceased Members).

In the settlement of the accounts of a deceased member of the armed forces ... an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living on the date of death:

(1) beneficiary designated by him in writing to receive such amount ....

(2) surviving spouse.

(3) children and their descendants by representation.

(4) father and mother in equal parts or, if either is dead, the survivor.

(5) legal representative.

(6) person entitled under the law of the domicile of the deceased member.

10 U.S.C. 8929 (Air Force/Computation of Retired Pay: Where Applicable).

A member of the Air Force retired under this Chapter is entitled to retired pay computed under Chapter 871 of this Title.

28 U.S.C. § 1331 (Federal Question; Amount in Controversy; Costs)

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs and arises under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1332 (Diversity of Citizenship; Amount in Controversy; Costs).

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the

sum or value of $10,000.00, exclusive of interest and costs, and is between --

(i) citizens of different states ***

28 U.S.C. § 1361 (Action to Compel an Officer of the United States to Perform His Duty).

The districts courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

37 U.S.C. § 701 (Army/Air Force Anti-Assignment Act).

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, a commissioned officer of the Army or the Air Force may transfer or assign his pay account, when due and payable.

Albert John FERN, Plaintiff-Appellant,

v.

Joan TURMAN and John O. Marsh, Secretary of the Army, Defendants-Appellees.

Robert Lewis STIRM, Plaintiff-Appellant,

v.

Loretta F. ADAMS and Verne Orr, Secretary of the Air Force, Defendants-Appellees.

Nos. 82-4577, 82-4581.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 12, 1983.

Decided July 10, 1984.

BROWNING, Chief Judge:

Appellants are retired military officers. Both were required by divorce decrees to pay a fixed percentage of their military retired pay to their former wives as divisible community property under state law. Both ceased payments after the United States Supreme Court held in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), that state courts were not free to divide retired military pay under community property laws.

The wives filed motions in the state courts to compel appellants to comply with the decrees. The husbands removed the cases to federal district court. They also filed complaints in federal court naming as defendants not only their wives but also the Secretaries of the Army and Air Force. They asked that the state divorce decrees be declared invalid insofar as they required payment of retired pay to their former wives or, in the alternative, for a declaration that the husbands were no longer subject to recall to active duty.

The complaints were dismissed on the basis of the domestic relations exception to diversity jurisdiction and the failure of the officers to state a federal claim other than as a defense to a claim based entirely on state law. These appeals followed.

While the appeals were pending, Congress passed the Uniform Services Former Spouses' Protection Act (FSPA), permitting state courts to treat retired pay as either personal or community property in accordance with state law. 10 U.S.C. § 1408(c)(i).

Federal question jurisdiction

Appellants argue their claims arise under federal law because their rights to military retired pay are determined by federal statute. They also argue federal question jurisdiction flows from their claims against the federal defendants.

The wives' claims for portions of their husbands' retired pay awarded the wives by the divorce decrees are at the heart of this litigation. These claims arise entirely under state law. The husband's federal preemption claims are defenses to these state claims. They are therefore not claims arising under the laws of the United States. *See Whittington v. Whittington*, 733 F.2d 620 (9th Cir.1984); *Armstrong v. Armstrong*, 696 F.2d 1237 (9th Cir.1983). The same is true for appellants' claim, raised for the first time on appeal, that the FSPA is unconstitutional. This conclusion is not altered by the fact that appellants seek declaratory relief. Appellants' proper course is to assert their federal preemption defenses and unconstitutionality claims in the state court actions and, if rejected there, to seek review in the United States Supreme Court. *Whittington, supra.*

The district court may well have had federal question jurisdiction over appellants' claims against the Secretaries of the Army and Air Force. The contention underlying these claims is that military retired pay is actually reduced compensation for current services, *see McCarty*, 453 U.S. at 222–23, 101 S.Ct. at 2736; *Costello v. United States*, 587 F.2d 424, 426 (9th Cir.1978), including exposure to recall to active duty at any time. 10 U.S.C. § 688(a). Appellants argue that if they are no longer to be paid for this service they cannot be required to perform it. They therefore ask that if the decrees are held valid despite appellants' arguments, the Secretaries be required to remove appellants' names from the active duty recall roster. Jurisdiction to hear this claim is asserted under 28 U.S.C. §§ 1331, 1332, and 1361.

In view of our holding that appellants must pursue their claims in state court, appellants' claims against the Secretaries of the Army and Air Force are not ripe for resolution. Ripeness has "'a twofold aspect, ... the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Pence v. Andrus*, 586 F.2d 733, 737 (9th Cir.1978) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967)).

State court proceedings are ongoing. Until these proceedings are completed and it has been determined that appellants must relinquish a portion of their retired pay, a decision by this court on the claims against the federal defendants would be premature. *See Bergstrom v. Bergstrom*, 623 F.2d 517, 519–20 (8th Cir.1980); *Rhodes v. Laurino*, 601 F.2d 1239, 1241 (2d Cir.1979); *Mendez v. Heller*, 530 F.2d 457, 461 (2d Cir.1976) (Oakes, J., concurring).

Even were we to assume an adverse decision by the state court, another contingency would remain. Until the Secretaries take some action to enforce appellants' military obligations, any decision by this court would address a purely hypothetical situation. There is no indication either appellant faces recall. Appellants' claims against the federal defendants are therefore unfit for judicial resolution because they are contingent both upon a decision of the state court not yet final and an administrative action not yet taken. *See Toilet Goods Ass'n. v. Gardner*, 387 U.S. 158, 163–64, 87 S.Ct. 1520, 1524, 18 L.Ed.2d 697 (1967).

Moreover, until appellants demonstrate a "threat of significant and immediate impact" from Secretarial action, *Kerr-McGee Chemical Corp. v. United States Dept. of Interior*, 709 F.2d 597, 600 (9th Cir.1983), denial of jurisdiction works no hardship on appellants and their claim based upon potential recall for active duty is not ripe. *Id.* at 602.

We reach the same conclusion regarding appellants' argument that the garnishment provision of the FSPA, 10 U.S.C. § 1408(d)(5), under which the Secretary may remit retired pay directly to former spouses, provides the court with jurisdiction. The claim that this provision is contrary to the requirements of *McCarty* is not ripe for adjudication until a garnishment order is served upon the Secretary.

Diversity jurisdiction

Although the order in *Fern v. Turman* is somewhat ambiguous, we conclude that in both cases the district court indicated an intention to exercise its discretion to decline jurisdiction based on the domestic relations exception to diversity jurisdiction. In the circumstances of these cases neither court abused its discretion.

A federal court has jurisdiction over cases when domestic relations issues are implicated only tangentially, *Csibi v. Fustos*, 670 F.2d 134, 137 (9th Cir.1982), but may decline to exercise that jurisdiction where the issues involved are closely related to issues within the domestic relations exception and considerations of comity and policy counsel against federal court intervention. *Id.; Lloyd v. Loeffler*, 694 F.2d 489, 492 (7th Cir.1982); *Sutter v. Pitts*, 639 F.2d 842, 843 (1st Cir.1981); *see also Bergstrom v. Bergstrom*, 623 F.2d 517, 520 (8th Cir.1980); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 632 (6th Cir.1978); *Armstrong v. Armstrong*, 508 F.2d 348, 350 (1st Cir. 1974); *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosentiel*, 490 F.2d 509, 516 (2d Cir.1973). Both of the cases before us fall in this category.

Appellants requested the district court to invalidate a term of their divorce decrees based upon an interpretation of federal law. Such a decision would likely require the state courts to determine whether compensating alterations in the decree, such as the addition or alteration of support terms, are necessary. There are ongoing proceedings in state court in both cases. The federal questions have been raised in these proceedings and can be addressed simultaneously with the question of any necessary modifications in the decree. Equitable considerations favor the resolution of the federal question and any resulting state law questions in a single proceeding. That can only be accomplished in the state court since the federal court could not modify the state court decrees. Duplicative and piecemeal litigation, and the resulting potential for inconsistent state and federal decrees, are avoided and judicial economy is served by allowing these issues to be resolved in state court. *See Lloyd v. Loeffler*, 694 F.2d at 492; *Bennett v. Bennett*, 682 F.2d 1039, 1043–44 (D.C.Cir.1982); *Huynh Thi Anh*, 586 F.2d at 633; *Armstrong v. Armstrong*, 508 F.2d at 350.

The cases relied upon by appellants are distinguishable. *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981), was on appeal from a state court judgment and presented no question of lower federal court jurisdiction. *Crouch v. Crouch*, 566 F.2d 486 (5th Cir.1978), involved an attempt to enforce a final state decree, not an attempt to modify such a state decree. Moreover, no state court proceedings were pending. *Erspan v. Badgett*, 647 F.2d 550 (5th Cir.1981) is a similar case.

Another consideration supports our conclusion. The decision to entertain a claim for declaratory relief rests within the discretion of the court, *see, e.g., Doe v. Gallinot*, 657 F.2d 1017, 1024 (9th Cir. 1981), and "[t]he fact that another action, involving substantially the same issue, is pending in a state or federal court is a potent factor in discretionary refusal to assume jurisdiction." *Puerto Rico Int'l Airlines, Inc. v. Recio*, 520 F.2d 1342, 1346 (1st Cir.1975) (quoting 6A Moore's Federal Practice ¶ 57.08[3] at 57–43 (3d Ed.1974). Judicial discretion to refuse to entertain declaratory actions "should be employed to avoid uncoordinated and unnecessarily disruptive adjudications of disputes in which state and federal issues are intertwined." *Geni-Chlor Int'l, Inc. v. Multisonics Devel. Corp.*, 580 F.2d 981, 985 (9th Cir.1978).

We also note that the usual reason for the exercise of diversity jurisdiction—protection of out of state litigants from state court prejudice—is not applicable here. Both husbands are citizens of California and presumably face no prejudice from California courts. *See Lloyd v. Loeffler*, 694 F.2d at 493; *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosentiel*, 490 F.2d at 515.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALBERT JOHN FERN, JR., Plaintiff, v. JOAN TURMAN and JOHN O. MARSH, Secretary of the Army, Defendants.	No. C-82-4821-WWS ORDER

In 1978, plaintiff Albert Fern, a colonel in the U.S. Army, obtained a divorce from his then wife, Joan Turman, one of the defendants in this suit. The divorce occurred in California. As part of the marital property settlement Joan Turman was awarded 45% of her ex-husband's military retirement pay, her share of this community property asset. On June 22, 1982, the Supreme Court ruled that state property law treating military retired pay as community property subject to equal division upon divorce conflicts with the congressional

intent that such pay be the personal entitlement of the retired veteran. McCarty v. McCarty, 453 U.S. 210 (1981). The Court did not determine whether this policy of treating military retired pay as separate property would be retroactively applied to property settlements and divorces that preceded the June 1981 decision.

On September 9, 1982, plaintiff filed suit in the federal district court seeking to collaterally attack the state court dissolution decree awarding his ex-wife a share of his army retirement benefits. Plaintiff's argument is that after McCarty the state cannot continue to enforce the decree insofar as it requires that he pay his ex-wife a monthly share of his retirement pay. He seeks an injunction against prospective enforcement of the state decree, retroactive recoupment of amounts already paid to his ex-wife, and declaratory relief.

There is no need to reach the merits of plaintiff's contention that McCarty should be retroactively applied because it is clear from the face of the complaint that this Court lacks jurisdiction to entertain this suit.[1/]

Plaintiff asserts that federal jurisdiction over this matter is proper on the basis of 28 U.S.C. § 1332(a) (diversity of citizenship). Section 1332(a) grants the district court original jurisdiction of all civil actions where matter in controversy exceeds $10,000 and is between citizens of different states. Joan Turman, one of the defendants in this suit, is now domiciled in Texas; the plaintiff resides in California.

An implied exception to diversity jurisdiction has been carved out by the courts in matters of domestic relations and family law. Deference to the classical concerns of federalism, a recognition of the primacy of state law in family matters, and an acknowledgment of the special and

sometimes exclusive competence of state courts to adjudicate domestic relations disputes have led the federal courts to deny or decline jurisdiction in such cases. See generally Bator, Shapiro, Mishkin & Wechsler, The Federal Courts and the Federal System 1189-92 (1973); Wright & Miller, Federal Practice and Procedure, Civil § 3609 (1975).

Much of this law has evolved from dicta in early opinions of the U.S. Supreme Court. In In re Burrus, 136 U.S. 586, 593-94 (1890), the Court stated:

> The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.

When asked to adjudicate matters which implicate state family law and existing state decrees governing relations among husband and wife, or parent and child, some federal courts have denied that they possess jurisdiction to hear such suits under the

diversity statute, 28 U.S.C. § 1332(a). See, e.g., Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968) (no jurisdiction in suit to establish paternity and obtain child support); Hernstadt v. Hernstadt, 373 F.2d 316 (2d Cir. 1967) (no jurisdiction to construe state court divorce decree); Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975) (no jurisdiction under diversity statute in action to enforce separation contract); and Kilduff v. Kilduff, 473 F. Supp. 873 (S.D.N.Y. 1979) (no jurisdiction over property and child custody agreement in matrimonial dispute).

Other courts have treated the question as one of abstention and have declined to exercise jurisdiction in actions to modify or enjoin the enforcement of state family law decrees. See, e.g., Armstrong v. Armstrong, 508 F.2d 348 (1st Cir. 1974) (policy and comity dictate abstention in action to modify divorce decree).

In this case, plaintiff attempts to collaterally attack a state court decree awarding his ex-wife a share of his army retirement benefits under state community property law. Plaintiff's proper recourse to challenge the validity of this decree is to appeal the state court judgment and raise his McCarty claim of federal preemption therein. Alternatively, plaintiff may assert this defense in an action to enforce the decree. The action is therefore dismissed for lack of subject matter jurisdiction.[2]

IT IS SO ORDERED.

DATED: September 21, 1982

/signed
WILLIAM W. SCHWARZER
United States District Judge

FOOTNOTES

1/ The Court can and should raise the lack of subject matter jurisdiction sua sponte if, at any time, there is a question whether jurisdiction is proper. See, e.g., AMFAC Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426, 430 n.5 (9th Cir. 1978).

2/ Leave to amend the complaint to assert jurisdiction under 28 U.S.C. § 1331(a) (federal question jurisdiction) will not be granted. The Court recently rejected McCarty as a basis for federal question jurisdiction in Swatosh v. Swatosh, No. C-82-4502-WWS (N.D. Cal., September , 1982) (Schwarzer, J.) and Lovato v. Lovato, No. C-82-0153-WWS (N.D. Cal., May 12, 1982) (Schwarzer, J.). A case does not arise under the Constitution or under federal statutory law merely because a defense based on federal law may be interposed. Nalore v. San Diego Federal Savings & Loan Assoc., 663 F.2d 841, 842 (9th Cir. 1981). And the Declaratory Judgment Act does not create jurisdiction in the federal courts merely because a litigant anticipates a federal defense. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673 (1970). Federal preemption of state property law constitutes a possible defense to the enforcement of a state divorce decree preceding the McCarty decision, a defense which may properly be asserted in the state court.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT LEWIS STIRM, Plaintiff, v. LORETTA F. ADAMS, Defendant, and VERNE ORR, SECRETARY OF THE AIR FORCE, Defendant.	No. C 82-0723 SW No. C 82-0749 SW ORDERS DISMISSING ACTION C 82-0749 AND REMANDING ACTION C 82-0723

Plaintiff in this action, Robert Lewis Stirm ("Stirm"), entered the United States Air Force on September 18, 1953, and retired as a colonel on June 1, 1977. On February 6, 1955, while he was on active duty, Stirm married defendant Loretta F. Adams ("Adams"). After eighteen years of marriage, Adams filed a petition for dissolution of the marriage in the San Mateo Superior Court. On July 22, 1974, the court filed an Amended Interlocutory Judgment of

Dissolution of Marriage. The decree of dissolution became final on August 15, 1974. Neither judgment was appealed.

In dividing the community property between the parties, the Amended Interlocutory Judgment distributed 42.6899% of Stirm's retirement pay to Adams (accrued as of September 17, 1973), and 42.6899% of Stirm's retirement pay to himself. The balance of the pay was confirmed to Stirm as his separate property. This division was in accordance with well-established California community property law at that time.

In June 1981, the United States Supreme Court ruled that federal law preempted state law from dividing a spouse's military retirement benefits upon a dissolution of marriage. McCarty v. McCarty, 453 U.S. 210 (1981). After the McCarty decision was handed down, Sitrm ceased making payments as required by the Amended Interlocutory Decree. On February 1, 1982, Adams moved the state court for an order to compel

compliance with the 1974 decree. Instead of defending in state court with a federal preemption argument, Stern purported to remove the "action" to this court pursuant to 28 U.S.C. § 1442a.

Shortly after affecting removal, Stirm filed an action in this court under 28 U.S.C. §§ 1331 and 2201. His complaint seeks a declaration that the 1974 state judgment is void insofar as it requires payments from his military retirement pay, based on the preemption of state community property law by federal veteran's legislation. The complaint also names Verne Orr, Secretary of the Air Force, as defendant for an alternative declaration that, if Stirm is subject to payment of a pro-rata share of his retirement pay to Adams, he must be removed from the list of retired officers who are subject to recall into active service, and whose continuing obligation is compensated for by the retirement pay.

Adams brought a motion to dismiss these complaints under Rule 12(b), arguing that the court lacked subject matter jurisdiction, that the McCarty decision was not retroactive, and that the state court judgment entered in 1974 was res judicata on all issues presently in dispute. Stirm filed his owr. motion for summary judgment arguing in essence that the previous state court judgment arguing in essence that the previous state court judgment would be collaterally attacked under the holding of the McCarty case.

After careful and lengthy consideration of the excellent and well-supported briefs of both parties, of the declarations and of all other relevant matters in the record, the court concludes that it is without jurisdiction over the declaratory relief action and that the state court "action" was improvidently removed. See Lovato v. Lovato, No. C-82-0153-WWS, (N.D. Cal. May 12, 1982) (Schwarzer, J.).

1. Removal Jurisdiction

A suit can be removed to federal court under 28 U.S.C. § 1441(a) only if it could have been brought here originally. Guinasso v. Pacific First Federal Savings & Loan Association, 656 F.2d 1364, 1365 (9th Cir. 1981). In order for this court to have original jurisdiction of the claims in this case, the action must "arise under" the laws of the United States. In addition, the asserted federal right must be an essential element of the plaintiff's cause of action, and the federal controversy must be "disclosed upon the face of the complaint, unaided by the answer. . . ." Gully v. First National Bank, 299 U.S. 109, 113 (1936).

In the present case, the "action"[1] Stirm removed from state court involved entirely state dissolution issues. The claim of federal preemption was made only in defense of Adams' attempt to enforce the previously entered judgment. It is well-established that a claim of federal preemption, taken alone, is not a basis for removal jurisdiction. Eureka Federal Savings & Loan Association v. Patterson, 534 F. Supp. 479, 481 (N.D. Cal. 1982).

This is not a case where state regulations directly conflict with federal regulations governing a federal association Cf. Conference of Federal Savings & Loan Association v. Stein, 604 F.2d 1256, 1259 (9th Cir. 1979), aff'd mem., 445 U.S. 921 (1980) (court held that justicable

---

1/ The state dissolution proceedings could not really have been "removed" since they were terminated by final judgment in 1974. Stirm only purports to remove Adams' state court motion to enforce the judgment not the entire action.

controversy under Article III existed where state and federal agencies took conflicting positions). On the contrary, the "federal" controversy here arises not on the basis of a perceived conflict that generated the complaint but rather solely on the basis of Stirm's defense to the state court action. Adams' complaint, the only basis upon which this court can assert its own jurisdiction, does not implicate federal law in any way.

In the alternative, Stirm seeks to remove this case on the basis of 28 U.S.C. § 1442a which provides in pertinent part:

> A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is

> pending in the manner prescribed by law, . . .

The present case does not involve an act done under color of Stirm's office or status as an Air Force officer. Furthermore, the implication of federal law, if at all,[2/] in no way involves the armed forces but rather a private dissolution proceeding between two parties, one of whom happens to have been in the armed services. Accordingly, removal on the basis of section 1442a was improvident and the "action" must be remanded to the state court.

2. Declaratory Relief

Plaintiff attempts to present the federal preemption issue to this court by way of an action for declaratory relief.

2/ The court notes that the McCarty rule appears to be inapposite to the facts of the present case. Courts have held both that the new federal rule cannot be applied retroactively, In re Marriage of Sheldon, 124 Cal. App. 3d 371, 177 Cal. Rptr. (1981) and that application of federal preemption is barred by res judicata. Erspan v. Badgett, 659 F.2d 559 (5th Cir. 1981)

However, it is well-established that "[t]he operation of the Declaratory Judgment Act is procedural only." Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 671 (1949). The Act widened the "range of remedies available in federal courts but did not extend their jurisdiction." Id. Therefore, a claim of federal preemption of a state domestic relations case[3/] cannot serve as a basis for subject matter jurisdiction, even if presented in the form of a request for declaratory relief. Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952).

Therefore, in light of the discretionary nature of a request for declaratory relief, see Travelers Indemnity Co. v. Boles, 503 F. Supp. 179 (N.D. Cal. 1980), aff'd mem. (9th Cir. 1982) and the

---

3/ Of course, federal courts traditionally have refrained from exercising jurisdiction over cases which in essence are domestic relations disputes. Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981).

lack of jurisdiction, the court dismisses plaintiff's original complaint. Similarly, plaintiff's alternative complaint against the Secretary of the Air Force is dismissed without prejudice. See Lovato v. Lovato, No. C-82-0153-WWS (N.D. Cal. May 12, 1982).

CONCLUSION

IT IS HEREBY ORDERED that Action No. C 82-0723 SW is remanded to state court.

IT IS FURTHER ORDERED that Action No. 82-0749 is dismissed.

IT IS SO ORDERED.

DATED: 9/3/84

/Spencer Williams
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Marriage of ALBERT JOHN FERN, JR., Petitioner, v. JOAN FERN, Respondent.	No. C-82-2189-WAI O R D E R

The above-entitled action is REMANDED to the Superior Court of the State of California, in and for the County of Monterey.

Removal is improper under either 28 U.S.C. § 1331 or § 1331 [sic]. No federal question is presented, and cases involving domestic relations are exempted from the jurisdictional grant predicated upon diversity of citizenship. Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968).

DATED: 9-15-82

/signed
WILLIAM A. INGRAM
United States
District Judge

SUPREME COURT OF THE UNITED STATES

No. A-226

ALBERT JOHN FERN AND ROBERT LEWIS STIRM,

Petitioners,

v.

JOAN TURMAN, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 8, 1984.

/s/ William H. Rehnquist
Associate Justice of the
Supreme Court of the
United States

Dated this 1st day of
October, 1984.

CERTIFICATE OF SERVICE

I, MATTANIAH EYTAN, one of the attorneys for petitioners Albert John Fern, Jr. and Robert Lewis Stirm, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of November, 1984, I served copies of the foregoing Petition for Writ of Certiorari on the several parties thereto, as follows:

1. On John O. Marsh, Secretary of the Army and Verne Orr, Secretary of the Air Force by depositing a copy of the document in a United States mailbox, with first class postage prepaid, addressed to G. Christopher Stoll, Esq., Assistant to the United States Attorney, 450 Golden Gate Avenue, 16th Floor, San Francisco, California 94102 and by depositing a copy of the Petition in a United States mailbox, with first class postage prepaid, addressed to Solicitor General, Department of Justice, Washington D.C. 20530.

2. On Joan Turman, by depositing a copy of the Petition in a United States mailbox, with first class postage prepaid, addressed to her counsel of record, Katherine E. Stoner, Esq., STONER, WELSH & SCHMIDT, 229 17th Street, P.O. Drawer H, Pacific Grove, California 93950.

3. On Loretta F. Adams by depositing a copy of the Petition in a United States mailbox, with First Class postage prepaid, addressed to her counsel of record, Michael A. Atherton, Esq., Atherton & Gunn, 550 Hamilton Avenue, Palo Alto, California 94603.

Mattaniah Eytan,

Attorney for Petitioners
Albert John Fern, Jr.
and Robert Lewis Stirm

KAPLAN, RUSSIN, VECCHI,
EYTAN & COLLINS
332 Pine Street
4th Floor
San Francisco, CA 94104
Telephone: (415) 421-1100